Supreme Court of the United States.

No. 67.

PHILADELPHIA BAR ASSOCIATION

CHESAPEAKE AND OHIO CANAL COMPANY,
APPELLANT,

vs.

A. ROSS RAY AND ALBERT RAY.

R. T. MERRICK,
M. F. MORRIS,
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Judd & Detweiler, Printers.

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CHESAPEAKE AND OHIO CANAL COMPANY,
APPELLANT,

vs.

A. ROSS RAY AND ALBERT RAY.

The Chesapeake and Ohio Canal Company leased to the plaintiffs, Ray & Ray, and those under whom they claim, a certain amount of water to be drawn from the company's canal, at Georgetown.

The lease is of so much water as will pass through an aperture of so many square inches in an iron plate.

The leases of Ray & Ray, and the form of lease used by the company, are printed in the Record.

By the covenants of the leases it is provided that the iron plate or gauge shall be placed in the side of the canal, "not nearer to canal bottom proper than two feet," and that in front of the aperture there shall be placed a sliding gate so that the water power may be entirely or partially cut off, as the necessities of the canal may require. Subsequent to the date of the leases under which Ray & Ray claim, a resolution was passed by the canal company authorizing the superintendent of the Georgetown division "to place the water gauges for the mills at Georgetown at such points as may be deemed advisable to affect the objects of the respective water grants, and to limit the flow of water to the quantity

to which the lessees are severally entitled: Provided, that said lessees shall severally assent in writing that the officers of the company may, at all times, have free access to their premises for examination or regulation of such parts as may be constructed upon them; and, provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such gauge or gauges, or any of them, as contemplated by the lease; and that this resolution shall not, in any manner, change or impair the provisions or requirements of the respective leases granted to said parties."

The millers assented to the provision of the resolution, and directed that the water gauges should be placed *upon their respective premises* at or near the water wheel.

The Canal Company finding that some of the millers disregarded the conditions of the leases and the resolution aforesaid, and were in the habit of removing their water gauges, and resorting to other contrivances for drawing more water than they were entitled to, and that this could easily be done without the knowledge of the agents of the company, because the gauges were concealed from view, and on the premises of the millers; and appreciating that the company could only be safe against such encroachments by having the gauges on their own premises, and constantly in view, ordered them to be removed back to the canal in the places where they were originally located, according to the terms of the lease, and before the granting of the license contained in the resolution above referred to.

The complainants thereupon filed their bill in equity, asking that the company might be enjoined from making such removal, and that it might be decreed that they were entitled to continue to have them in the places where they were put under said resolution.

The Court below granted the relief prayed for by complainants, and the other cases of the millers are to abide by the decision of the Supreme Court in this case.

Errors Assigned.

I.

In granting the relief.

II.

In determining that the discretion of the Canal Company, to change the location of the gauges, reserved in the resolution, was limited by any contingency expressed in the covenants of the leases.

III.

In determining that the Canal Company did not possess the power to change the location of the gauges in their discretion.

IV.

In enjoining and prohibiting the Canal Company from changing the location of the gauges.

No evidence was taken in the case, and it was tried upon bill and answer.

The record in this Court contains a large amount of matter not properly belonging to it.

Bill and answer give a full statement of the positions claimed by the respective parties.

The questions arising are—

First. What is the true construction of the resolution of the Canal Company, (p. 22, Rec.,) waiving its right to have the water gauges located where the leases provided that they should be located, but reserving the right at any time to put them back again, in their discretion?

Second. The contract of lease between the defendant and the Canal Company being under seal, it cannot be changed by any instrument of a less formal character. Any conditions therein for the benefit of the company could be waived by it in the most informal way, but such waiver would amount to a mere license to the lessee, revocable at pleasure by the party granting it, though operating as a full protection for everything done under it while remaining unrevoked.

2 Am. Lead. Cas., Prince *vs.* Case, 540. Notes and cases cited.

R. T. MERRICK,
M. F. MORRIS,
Counsel for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CHESAPEAKE & OHIO CANAL COMPANY,
Appellant,
vs.
A. ROSS RAY & ALBERT RAY.

No. 67, October Term, 1879.

BRIEF OF APPELLEES.

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Weber & Leonard Print. 505 D Street N. W.

IN THE

SUPREME COURT

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THE CHESAPEAKE & OHIO CANAL COMPANY,
Appellant,
vs.
A. ROSS RAY & ALBERT RAY.

No. 67, October Term, 1879.

This is an appeal from a decree of the Supreme Court of the District of Columbia, perpetually enjoining the appellant from changing the position of the mill of the appellees, and from demanding such change on their part, save only in the contingency of such change being necessary to prevent, or lessen, inconvenience to the navigation of the canal of the appellant, or to the use of the towing path, or for the greater security of the canal, or any of its works, (See the decree R 60—affirmed in General Term, R 61.)

THE CASE.

The appellants are manufacturers of flour. Their mill is situated on Potomac Street, in Georgetown, in this District, between the Potomac River and the canal of the appellant, and about 250 feet from the latter. The mill was built in 1848, with exclusive reference to the use, as a motive power,

of water to be supplied from the canal, (R 1 29). Until 1860 this motive power was obtained, in part by assignment (ratified by the appellant R 15 39) from the former mill owner, who had sold the site upon which the mill of the appellees was built, and in part from the appellant under a temporary arrangement (R 1 29).

In 1859, the appellant having water to lease, the appellees, at heavy expense, enlarged the capacity and machinery of their mill, and on the first of May, 1860, water leases were executed by the appellant, one for 400, and the other for 100 square inches of water. The latter was executed, or was so intended, in pursuance of the assignment above mentioned. Upon the execution of these leases the supply under the temporary arrangement ceased. These leases will be found R 15. 18.

The works for the supply of water, as set forth in them, consisted of an aperture or gauge in an iron plate, not exceeding half an inch in thickness, as many inches in height and length as would make up the number of square inches; of a sliding gate, so that the water might be shut off; of a forebay or trunk for conducting the water through the canal bank from the aperture, and of a cover or bridge over the forebay (R 15 19). The location of the aperture or guage at the canal bank is not fixed more definitely than that it shall not be nearer canal bottom proper than two feet. The shape of the aperture is indeterminate. The location of the sliding gate and forebay and bridge is also uncertain. These works are to be constructed and kept in repair at the cost of the appellees, and under their special direction and superintendence, and subject in every particular to the approval of the proper officers of the appellant (R 16 19).

When the enlargement of the mill and machinery was completed, or about to be completed, in 1860, it became necessary to carry into effect the executory provisions of the lease in respect to the above works. The forebay and bridge

were duly located at the canal bank, but the aperture and sliding gate were located at or near the wheel of the mill, instead of at the bank, and this was done by the direction and approval of the appellant, (R 2 pl 6 also 29 pl 6.) In addition to the works required by the leases, a gate was, at the cost of the appellees, placed at the opening of the forebay into the canal, so as to enable the appellant to control the water.

The aperture and sliding gate thus placed at the wheel, in 1860, have since continued there, and have been repeatedly inspected by the officers of the appellant, and kept in repair at the cost of the appellees, under the superintendence of such officers. The rent for the water has been punctually paid, and the covenants of the lease duly performed by the appellees. The substitution in the execution of the provisions of the lease, and by the mutual consent of one point instead of another, in respect of the location of the aperture or gauge, (which substitution was acquiesced in for twelve years,) the appellant claims the right to revoke, upon the ground that it operated as a mere license revocable at pleasure. Such substitution, it is conceded, was of considerable advantage to the appellees, as it gave them, at the point of the delivery of the water, the benefit of the canal pressure through the forebay, but it worked no loss to the appellant. It merely enabled the appellees to obtain what they leased and paid for, but what otherwise they could not have received fully, owing to the distance of their mill from the canal.

Chesapeake and Ohio Canal Company v. Hill, 15, Wall 94

To proceed: after providing for the construction and location of the above works, the leases provide that, at the cost of the lessees, such alterations may be made from time to time, in the aperture and sliding gate, and the forebay or bridge, as may be considered necessary by the lessor to prevent or lessen, *inconvenience to the navigation of the canal, or to*

the use of its tow path, or that may be thought necessary by the lessors for the greater security of the canal, or of its works. (R. 16 pl 6 also 19 pl 6.)

Early in 1865 other millers, lessees of water from the same level, applied to the appellant to have their gauges placed at their wheels, instead of at the canal bank, and thereby obtain the full benefit of the water lease. The result was a Resolution, dated February 23, 1865, applicable to all the millers who should comply with its terms, and as follows:

"Resolved. That the superintendent of the Georgetown division, under the direction of W. E. Smith, C. E., be directed to place the water gauges for the mills at Georgetown, at such points as may be deemed most advisable to effect the objects of the respective water grants, and to limit the flow of water to the quantity to which the lessees are severally entitled: Provided, That said lessees shall severally assent in writing that the officers of the company may, at all times, have free access to their premises for examination or regulation of such parts as may be constructed upon them, and provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such gauge or gauges, or any of them, *as contemplated by the lease*, and that this resolution shall not, in any manner change or impair the provisions or requirements of the respective leases granted to said parties. (R p 22) This Resolution was assented to in writing by the appellees in common with other millers." (R 3 22 59.)

After the contract evidenced by the Resolution and its acceptance, the millers, who had assented, were enabled to receive the full quantity of water which they had leased. The appellant simply relinquished an unconscionable advantage, whereby the rent paid for water was unfair and unequal, depending as it did, not upon the quantity of the water, but the location of the mill, 15 Wall, 94.

This state of things continued for about eight years. In the meantime a certain Henry Dodge, having a claim against the appellant, took in settlement, in 1870, a water lease for 2700 inches of water for fifty years, at the nominal rent of twenty five cents per inch, and renewable for a bonus of ten dollars, and also a lease of a valuable strip of land, extending between the Potomac River and the canal, a distance of 2700 feet, which lease was for fifty years, at the nominal rent of $100 per annum, and renewable forever at the rent of $200 per annum on payment of a bonus of ten dollars (R. 5. 23. 26.)

In January 1873, the appellant passed the Resolution requiring the millers to place their gauges at the canal bank, and ordered the water to be shut off in the event of refusing. The right thus to shut off is claimed under the 9th article of the leases (R. 17.) This resolution, filed with the bill (R. 6. pl. 14,) and admitted by the answer (R. 33,) is not in the record, and is important. It claims, in substance, that the change of the gauge, authorized by the Resolution of February 23, 1865, was a mere license revocable at pleasure, and irrespective of the provision mentioned above in relation to the alteration of the works. The appellees upon being notified of the Resolution (R. 6. 27.) refused to comply and filed their bill for an injunction. On the coming in of the answer a preliminary injunction was granted. (R. 44.) To the answer a replication was filed, (R. 60.) No evidence was taken by either party. Certain admissions were made by the appellant, and among them the admission that the arrangement under the Resolution of February 23, 1865, had been duly observed by the appellees. (R. 59.) The damage to ensue to the appellees from the change of the gauge is fully set forth in the 15th paragraph of the bill. (R. 6. 7.) The insolvency of the appellant is admitted. The bill further alleges that by the leases of the water subsequent to those of the appellees, and by the accumulation of Banks of earth in the canal, and the dam and feeder having become delapida-

ted, owing to the neglect of the appellant, the supply of the water to which the appellees are entitled under their leases, had become impracticable if drawn at the bank. The ground of the decree, however, is that, the Resolution of the 23d of February, 1865, having been assented to by the appellees as required, was irrevocable, save for the special causes for which changes in the works could be made under the leases, that is, where such changes were necessary to lessen or prevent inconvenience to navigation, or to the use of the tow path, or for the security of the canal, or its works. The question determined below, therefore, was simply that the appellant did not possess the right arbitrarily to revoke in the absence of the special contingencies.

The appellant insists on such arbitrary power, and whether it exists or not, is the whole matter in dispute. Whilst it is submitted that there is no error in the decree, it is denied that this Court has any jurisdiction of the appeal. The matter in dispute is not money or property exceeding in value $2500. The appeal, therefore , ought to be dismissed on the ground of want of jurisdiction.

POINTS.

I.

The gauge of appellees having been originally fixed by mutual consent, and in execution of the leases, and such fixation having been mutually acquiesced in for many years, a Court of Equity will not allow either party arbitrarily to change what has been thus done. It rarely happens that the executory provisions of such leases are executed with technical precision, and where deviations have been made, as here, to promote the main objects of the leases, such deviations become in equity as binding as the provisions. The parties to the leases properly supposed that their main object would be better promoted by placing the gauge and sliding gate at the wheels instead of the bank, and to protect the appellant from the posibility of damage a gate, in addition to the works

called for by the leases, was constructed, at the cost of the appellees, at the canal mouth of the forebay, and thereby the appellant was enabled absolutely to control the supply of water. The leases having been thus executed, such execution is binding.

II.

The plain meaning of the Resolution of the 23d of February 1865, is that the gauges, placed at the wheels, may be changed "AS CONTEMPLATED BY THE LEASES," that is, according to the provision of the leases, when such change shall be necessary for navigation, or the use of the tow path, or the protection of the canal, or its works. The position of the gauges at the wheels was intended simply to be substituted in lieu of their position under the lease, and to be subject to the same liability to change for the specific causes mentioned. The Resolution, when assented to by the appellees, constituted a contract for valuable consideration. The expense of the change fell upon the millers, and they were required by the terms of the Resolution to assent in writing that the officers of the company should have free access at all times to the mills for the examination and regulation of the gauges, and this stipulation appellees gave. Whilst there must be a consideration to support a contract, the law does not measure the extent of it. Any benefit resulting to the promisor, or any charge or obligation or inconvenience to the promisee, however trifling, will support a contract. Chitty on Contracts, 28, 29, 30. So a mere promise is a sufficient consideration. Id. 44.

The brief of the appellant does not deny the consideration, but it is claimed that the leases, being under seal, could not be altered by even a written contract not under seal, though made upon a valuable consideration. This, it is submitted, is a mistake. Parol evidence, whether oral or written, would not be admissable to contradict or vary the words

of the leases, or to show that the parties *by the leases intended* that the gauges should be, not at canal bank but at the wheels. The case, however, is entirely different when it is shown that, by a subsequent agreement, upon sufficient consideration, the parties have abrogated all or any part of the original leases. In such case there can be no doubt that the subsequent agreement is valid. Greenl. Ev. s. 303 and cases cited. 2, Phillips Ev. 4, Am. Ed. p. 92, and Hill's note 505, and cases cited; where the whole subject is discussed. Watchman v. Crook, 5, G. and J. 239. Dearborn v. Cross, 7, Cow. 48. Chitty on Contracts p. 116, notes E and F., and cases cited. Blasdell v. Souther 6, Gray 149, 151.

The maxim, "*unumquod-que dissolvi eo ligamine quo ligatum est*" has no applicatian to the manner in which a contract has been performed if such performance has been accepted. A party to an executory agreement cannot accept its execution as made and then sue for something else. Besides, this case is in a Court of equity, and nothing is more common there than to vary sealed papers by written or oral evidence of a subsequent contract upon consideration.

Canal Co. v. Hill, 15, Wall. 94.

Even if the Resolution was not a contract, but a mere license or dispensation, still after execution at the expense of the licensees it became in equity irrevocable. 3 Kt. Comm. 452. Rerick v. Kern, 14 Serg, v. Rawle 267 reported.

2 American Leading Cases, 733, and cases cited. Le Fevre v. Le Fevre 4 Serg v. Rawle 241.

Such a license will be enforced in equity as a contract. See above cases.

IV.

As to jurisdiction.

Pratt v. Fitzhugh 1 Black 271.
DeKrafft v. Barney 2 Black 704.

Barry v. Mercein 5 How. 103.

The money value of the claim set up to revoke arbitrarily nowhere appears and does not exist. The jurisdiction of this Court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute.

Ross v. Prentiss,—3 How. 771.

W. D. DAVIDGE,

For Appellees.